

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG 16 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0029
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
CONSTANTINO RODRIGUEZ ORDUNO,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100951001

Honorable Jane L. Eikleberry, Judge

AFFIRMED

Robert J. Hirsh, Pima County Public Defender
By Lisa M. Hise

Tucson
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 Appellant Constantino Orduno was charged with aggravated driving under the influence of an intoxicant (DUI) and aggravated driving with an alcohol concentration (AC) of .08 or greater, both based on DUI while his driver license was suspended, revoked, or restricted at the time of the offense; aggravated DUI and aggravated driving with an AC of .08 or greater, both based on two or more previous DUI convictions; four counts of endangerment; possession of marijuana; and possession of drug paraphernalia. The state alleged he had two prior DUI convictions and filed various sentence-enhancing allegations, including, as to the endangerment counts, that the offenses were of a dangerous nature, that Orduno had four historical prior felony convictions, that he had committed the offenses while on release, and that he had committed dangerous offenses while on release.

¶2 After a three-day trial, the jury found him guilty of all but the endangerment charges, which were dismissed with prejudice after the jury was unable to reach a verdict on them. After a trial on the allegations of prior felony convictions, the trial court found Orduno had three prior convictions for aggravated DUI. The court sentenced him to concurrent, presumptive, and enhanced prison terms of ten years on the DUI convictions and 3.75 years for possession of marijuana and drug paraphernalia. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Orduno has not filed a supplemental brief.

¶3 Counsel reviewed the record and although she avows she found no issue that is meritorious, she asks us to consider as a possibly meritorious issue that there was insufficient evidence to support the convictions for possession of marijuana and drug paraphernalia. She asserts the state did not present the physical evidence itself, that is, the baggie or the marijuana. And, given the lack of physical evidence, she contends the verdicts were based solely on testimony a substance had been seized and it was determined to be marijuana. Counsel asks us to consider whether the evidence supports these verdicts, but seems to also suggest the trial court should have entered a judgment of acquittal.

¶4 We review the sufficiency of evidence presented at trial to determine if substantial evidence exists to support the jury's verdicts. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913 (2005). Substantial evidence is that which reasonable minds could consider sufficient to establish beyond a reasonable doubt that the defendant committed the charged offenses. *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). We will not set aside the verdict unless it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion[s] reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). And we review de novo the claim that the record lacks substantial evidence to support a jury's verdicts. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶5 To the extent counsel also is suggesting the trial court should have entered a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., our review is essentially

the same.¹ We must decide “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011), quoting *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). A judgment of acquittal should be granted only “[w]here there is a complete absence of probative facts to support a conviction.” *Mathers*, 165 Ariz. at 66, 796 P.2d at 868. If reasonable minds could differ “on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal.” *West*, 226 Ariz. 559, ¶ 18, 250 P.3d at 1192, quoting *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶6 The state presented substantial evidence establishing Orduno had knowingly possessed marijuana and drug paraphernalia, in violation of A.R.S. §§ 13-3405, 13-3415(A). We are not aware of any authority requiring the state to present at trial the actual marijuana and the baggie in which the marijuana was found in order to obtain a conviction. The evidence showed he had possessed these items and established their chain of custody from seizure by the police officer who arrested and searched Orduno to storage and testing. The criminalist testified how she had obtained the green leafy substance and that she tested it, determining it was 632 milligrams of marijuana.

¹Presumably, counsel suggests we consider whether the trial court, sua sponte, should have entered judgments of acquittal on these charges. Trial counsel does not appear to have moved for a judgment of acquittal at trial.

¶7 We have reviewed the entire record for reversible error and have found none. The evidence amply supports all of the convictions, and the sentences imposed are both lawful and were imposed in a lawful manner. *See* A.R.S. § 13-703(J) (prescribing presumptive sentencing terms for felony classes based on three or more historical prior felony convictions). We, therefore, affirm the convictions and the sentences imposed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge